

FILED BY CLERK

OCT 31 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0326-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICARDO RIVERA SILVA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2010005841011DT

Honorable Paul J. McMurdie, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
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Phoenix
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Carefree
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Ricardo Silva petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its

discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Silva has not met his burden of establishing such abuse here.

¶2 Silva pled guilty to sale or transportation of marijuana and was sentenced to a five-year prison term. Approximately seven months later, Silva filed a notice of and petition for post-conviction relief. He asserted that, after his guilty plea, the trial court granted a motion to suppress wiretap evidence filed by one of Silva’s codefendants before Silva had pled guilty. In granting the motion, the court found that a police detective was “not a reliable witness” and that there was no probable cause for the wiretap without the detective’s “uncorroborated information.”

¶3 Silva argued that the trial court’s findings constituted exculpatory evidence the state was required to disclose to him pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and that the detective’s lack of credibility constituted newly discovered material facts pursuant to Rule 32.1(e). He asserted he had “no reason . . . to question” the detective’s credibility at the time he pled guilty and he had entered his plea “under a belief that the officers involved in the investigation were credible.” He further claimed he was permitted to raise a *Brady* claim in post-conviction proceedings because he would not have pled guilty had he been aware of the detective’s “substantial credibility deficits.” The court summarily denied relief, concluding there “was no *Brady* violation in this case prior to the entry of plea,” relying on *United States v. Ruiz*, 536 U.S. 622 (2002), and noting that Silva’s guilty plea “waived all non-jurisdictional defects.”

¶4 On review, Silva again claims the trial court’s findings related to the officer’s credibility constituted *Brady* evidence and newly discovered evidence. He

further asserts the court misapplied *Ruiz*, in which the United States Supreme Court determined that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” 536 U.S. at 633.

¶5 Pursuant to *Brady*, the state is required to disclose any evidence favorable to the accused and its failure to do so violates due process. *State v. O’Dell*, 202 Ariz. 453, ¶ 10, 46 P.3d 1074, 1078 (App. 2002). Silva’s precise argument on review is difficult to parse. To the extent he argues the state’s failure to notify him of the trial court’s ruling on his codefendant’s motion to dismiss constituted a *Brady* violation, that claim is not cognizable under Rule 32. Even if Silva is correct that a trial court’s finding can constitute exculpatory evidence the state is required to disclose pursuant to *Brady*, no provision of Rule 32.1 contemplates relief for constitutional violations occurring after a defendant has been convicted and sentenced, except for a claim pursuant to Rule 32.1(d) that a defendant is being held past the expiration of sentence.¹ And, although the trial court did not deny relief on this basis, we are obliged to uphold the court’s ruling if correct for any reason. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¹Notably, the case Silva cites in support of this argument discusses *Brady* in the context of a claim pursuant to 42 U.S.C. § 1983, not post-conviction relief. *Tennison v. City & Cnty. of San Francisco*, 570 F.3d 1078, 1081, 1086 (9th Cir. 2008). And Silva cites no authority expressly holding that the state must disclose exculpatory information discovered after a pleading defendant has been sentenced when that defendant has not instituted a post-conviction proceeding.

¶6 Silva also appears to suggest that the state violated *Brady* by failing to disclose the detective's credibility issues before he entered his guilty plea, thus violating his due process rights. To the extent that claim is separate from his claim of newly discovered evidence and assuming the claim is cognizable in light of *Ruiz*, Silva cannot raise it because he did not timely seek post-conviction relief. *See* Ariz. R. Crim. P. 32.4(a) (of-right proceedings must be initiated within ninety days); *see also* Ariz. R. Crim. P. 32.1(a); *Perez*, 141 Ariz. at 464, 687 P.2d at 1219.

¶7 This leaves only Silva's claim that the evidence related to the detective's credibility is newly discovered evidence relevant to his decision to plead guilty. A claim of newly discovered evidence can be raised in an untimely post-conviction proceeding. *See* Ariz. R. Crim. P. 32.1(e), 32.4(a). To prevail, Silva must "establish that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict" or sentence. *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000).

¶8 We agree with the state that Silva has not demonstrated that the evidence concerning the detective's lack of credibility could not have been discovered through reasonable diligence. *See Perez*, 141 Ariz. at 464, 687 P.2d at 1219. Silva asserted below that he had no reason to question the detective's testimony because her name did not appear in the wiretap affidavit or in his codefendant's motion to dismiss. But the motion to suppress called into question the assertions made in the wiretap affidavit, and

Silva identifies nothing in the record suggesting that the detective’s role in providing the information in the affidavit would not have been revealed by interviewing the affiants or other involved individuals. Indeed, he acknowledged in his petition below that “credibility issues . . . regarding the detective’s information in the affidavit” came to light in an interview occurring only days after Silva’s guilty plea. In short, the record flatly contradicts any suggestion the evidence could not have been readily discovered. The evidence came to light due to his codefendant’s decision to fully investigate and litigate the motion to suppress—a motion Silva joined but chose to abandon by pleading guilty.²

¶9 For the reasons stated, although review is granted, relief is denied.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Michael Miller

MICHAEL MILLER, Judge

²We therefore need not reach Silva’s argument that the trial court erred in relying on *Ruiz* or his claim that a defendant does not waive non-jurisdictional defects by pleading guilty when the state has failed to disclose exculpatory information.